STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal from the Court of Appeals, Cavanagh, P.J., and Jansen and Fort Hood, JJ.)

JOSIP RADELJAK, Personal Representative, Estate of ENA BEGOVIC, Deceased; JOSIP RADELJAK, Individually and as Next Friend of LANA RADELJAK; LEO RADELJAK and TEREZA BEGOVIC,

Plaintiffs-Appellees,

v

DAIMLERCHRYSLER CORPORATION,

Defendant-Appellant.

Supreme Court No. 127679

Court of Appeals No. 247781

Lower Court
Case No: 02-228401-NP

/

BRIEF AMICUS CURIAE OF THE MICHIGAN MANUFACTURERS ASSOCIATION

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STATEMENT OF QUESTIONS INVOLVED

I. SHOULD THE PUBLIC INTEREST FACTORS OF THE *FORUM NON CONVENIENS* DOCTRINE SET FORTH IN *CRAY V GENERAL MOTORS CORP*, 389 MICH 382, 396 (1973), BE REVISED OR MODIFIED?

The trial court did not address this question.

The Court of Appeals did not address this question.

Plaintiff answers "Yes."

Defendant answers "Yes."

Amicus Curie MMA answers "Yes."

II. WHERE A MORE APPROPRIATE FORUM EXISTS, MUST A MICHIGAN COURT DETERMINE THAT ITS OWN EXERCISE OF JURISDICTION WOULD BE "SERIOUSLY INCONVENIENT" BEFORE DISMISSING A CASE ON *FORUM NON CONVENIENS* GROUNDS?

The trial court did not directly address this specific question.

The Court of Appeals answered "Yes."

Plaintiff answers "Yes."

Defendant answers "No."

Amicus Curie MMA answers "No."

III. DID THE COURT OF APPEALS AFFORD APPROPRIATE DISCRETION TO THE TRIAL COURT'S CONCLUSIONS REGARDING THE RELATIVE CONVENIENCE OF THE COMPETING FORUMS?

The Court of Appeals would answer "Yes."

Plaintiff answers "Yes."

Defendant answers "No."

Amicus Curie MMA answers "No."

IV. IS APPLICATION OF THE *FORUM NON CONVENIENS* DOCTRINE CONSISTENT WITH MICHIGAN LAW REGARDING VENUE AND JURISDICTION?

The trial court did not address this question.

The Court of Appeals did not address this question.

Plaintiff answers "No."

Defendant answers "Yes."

Amicus Curie MMA answers "Yes."

INTEREST OF AMICUS CURIAE

The Michigan Manufacturers Association ("MMA") is a business association composed of more than 3,000 Michigan businesses. An important aspect of MMA's activities is representing the interests of its member-companies in matters of paramount importance before state and federal courts, the United States Congress, the Michigan legislature, and state agencies. MMA appears before this Court as a representative of business concerns employing over 90% of the industrial workforce in Michigan.

Resolution of the issues presented by this case will have implications for MMA's members because products manufactured in Michigan are used all over the world. If this Court weakens the *forum non conveniens* doctrine in Michigan, MMA members will likely be subject to suit in Michigan for injuries occurring worldwide that have no substantial connection to Michigan. The United States, and Michigan in particular, should not serve as courthouse to the world. Courts in the United States and Michigan exist, and are supported by tax payers, to resolve controversies that are of substantial interest to the citizens of the United States and Michigan. When an accident involving a product occurs outside of the state or country, and litigation regarding the accident would be more conveniently conducted outside of the state or country, MMA members (and Michigan tax payers) have a strong interest in seeing that the litigation occurs in the most convenient forum.

This Court invited the participation of the MMA in its June 10, 2005 order granting Defendant's application for leave to appeal.

STATEMENT OF FACTS

MMA adopts Defendant-Appellant DaimlerChrysler Corporation's Statement of Facts.

ARGUMENT

I. The public interest factors of the *forum non conveniens* doctrine set forth in *Cray v General Motors*, 389 Mich 382; 207 NW2d 393 (1973), should be clarified and expanded consistent with *Gulf Oil Corp v Gilbert*, 330 US 501 (1947).

A. Re-Stating the *Cray* Test

In its order granting leave to appeal, the Court asks whether the public interest factors set forth in *Cray v General Motors*, 389 Mich 382; (1973), should be "revised or modified." *Amicus* asserts that a modest change in the statement of the public interest factors would benefit the bench and bar by clarifying the nature of the public interest at stake without changing the law. MMA suggests a clarification that would (1) properly recognize the important role that the public interest has in the application of the *forum non conveniens* doctrine, (2) be consistent with this Court's prior reliance on the United State's Supreme Court's statement of the *forum non conveniens* doctrine, and (3) assist trial courts and litigants in properly considering the public interest concerns relevant to the *forum non conveniens* doctrine.

The *Cray* Court distilled existing precedent from other jurisdictions (primarily *Gilbert*) to generate a statement of three "public interest" factors:

> a. Administrative difficulties which may arise in an area which may not be present in the area of origin;
>
> b. Consideration of the state law which must govern the case;
>
> c. People who are concerned by the proceeding.

Cray, *supra* at 396. Plaintiff contends that these factors, as stated in *Cray*, are "ambiguous" and "difficult to understand." (Plaintiff's brief, pp 34-35). *Amicus* agrees. As stated in *Cray*, only the second of the three factors has a meaning that is clear without reference to other sources. With respect to the first public interest factor, the meaning of the phrase "area of origin" is not entirely clear; nor is there any explanation of what sort of "administrative difficulties" might

qualify. Does this factor, as stated in *Cray*, require the court to compare specific "administrative difficulties" existing in various appropriate venues? The answer is not clear. The third factor, as stated in *Cray* is even less helpful. Who are the "people" referred to (parties?, witnesses?, jurors?, local tax payers?) and how are their "concerns" to be factored into the equation? A bit more explanation would be helpful.

If the stated "public interest" factors are not easy to understand and apply, then they are more likely to be ignored or glossed over by parties and courts. *Amicus* contends that a logical place to look for clarification of the *Cray* public interest factors would be their source. When this Court adopted the *forum non conveniens* doctrine, its decision to do so was inspired by the United States Supreme Court's seminal decision in *Gulf Oil Corp v Gilbert*, 330 US 501; 67 S Ct 839; 91 L Ed 1055 (1947). See *Cray*, *supra* at 390, 395. The *Gilbert* decision is often cited as the source of the private and public interest factors American Courts use to resolve *forum non conveniens* issues. See, e.g., *Flores v S Peru Copper Corp*, 253 F Supp 2d 510, 528 (S.D.N.Y. 2002). *Gilbert* set forth five public interest factors that are entirely consistent with, though more detailed, than the three public interest factors described in *Cray*. *Id.* at 508-509. The five public interest factors set forth in *Gilbert* are more specific and straightforward than the three somewhat-vague public interest factors set forth in *Cray*. As a result, they are easier for courts and litigants to understand and apply.

Factor one from *Gilbert* is the "[a]dministrative difficulties that follow for courts when litigation is piled up in congested centers instead of being handled at its origin." *Gilbert*, *supra* at 508. This explanation of "administrative difficulties" is easier to understand than the *Cray* formulation because it clarifies that "administrative difficulties" means overcrowded courts. If a particular venue becomes attractive to Plaintiffs (i.e., Madison County, Illinois or Wayne

County, Michigan), then the overcrowded courts in those areas would need a strong *forum non conveniens* doctrine in order to empower them to force a more natural distribution of judicial burdens. This factor can be distilled to "the administrative difficulties flowing from court congestion." See *Piper Aircraft Co v Reyno*, 454 US 235, 241 n 6; 102 S Ct 252; 70 L Ed 2d 419 (1981) (restating the *Gilbert* factors).

Factor two is the notion that "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gilbert*, *supra* at 508. The *Cray* factors do not specifically mention the burden that is jury duty. In cases where the citizenry have no logical connection to the litigation (such as those involving foreign nationals seeking compensation for foreign injuries), the burden of jury duty counsels against the retention of jurisdiction. Just because the right to a jury trial exists in the United States does not mean that Americans should be expected to undertake the burden of becoming jurors for the world. This factor can be distilled to "the unfairness of burdening citizens in an unrelated forum with jury duty." *Piper Aircraft*, *supra* at 241 n 6.

Factor three is the notion that trials should be held in view and in reach of those persons affected by the case, rather than in remote parts of the country (or in other countries for that matter). *Gilbert*, *supra* at 509. The *Cray* factors do not expressly heed this important interest. This factor can be distilled to the benefit of conducting the trial in the place most accessible to those persons directly affected by, or involved in, the proceeding.

Factor four is similar to factor three, but broader in scope: "[L]ocal interest in having localized controversies decided at home." *Gilbert*, *supra* at 509. Rather than focusing specifically on the persons directly touched by the case (as in the previous factor) factor four considers the broader local interest in the resolution of local controversies. This factor can be

distilled to "the local interest in having localized controversies decided at home." *Piper Aircraft*, *supra* at 241 n 6.

Finally, factor five is the logical notion that courts are more comfortable and adept at applying their own home state law. *Gilbert*, *supra* at 509. This idea, which is captured by the second *Cray* factor, makes good sense. Obviously, if Croatian law is to be applied, then the Wayne County Circuit Court would have a strong interest in avoiding the dispute if possible, since Croatian law is best left to Croatian judges. This factor can be distilled to "avoidance of ... the application of foreign law." *Piper Aircraft*, *supra* at 241 n 6.

None of the specific *Gilbert* factors are at odds with the *Cray* factors. As stated in *Gilbert*, however, they are easier to quickly understand and apply. Accordingly, *Amicus* urges the Court to restate the public interest factors as follows:

a. the administrative difficulties flowing from court congestion;

b. the unfairness of burdening citizens in an unrelated forum with jury duty;

c. the benefit of conducting the trial in the place most accessible to those persons directly affected by, or involved in, the proceeding;

d. the local interest in having localized controversies decided at home; and

e. the avoidance of the application of foreign law.

A statement of the public interest factors along these lines would more succinctly capture the important ideas first noted in the *Gilbert* case without substantively changing Michigan *forum non conveniens* law.

B. Applying the *Cray* Test to Foreign Cases Brought Against Domestic Manufacturers

Although every case is unique on some level, one may generalize about the class of cases like the present, i.e., those involving foreign injuries and foreign plaintiffs brought in Michigan against Michigan-based businesses. Typically, this sort of case will be subject to dismissal on *forum non conveniens* grounds. In *Piper Aircraft*, *supra*, Justice Marshall, writing for the majority, concluded on facts much like the facts of the instant case, that "[t]he American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here." *Id.* at 261. A significant public interest factor influencing the *Piper Aircraft* decision was the fact that favorable American laws (such as strict liability) and procedures (such as the availability of a jury trial) had made American courts popular destinations for foreign litigants and, as a result, had caused undue congestion in American courts. *Id.* at 252. Because the relevant facts of this case are indistinguishable from those of the *Piper Aircraft* case, it cannot be said that the Wayne County Circuit Court abused its discretion in reaching the same decision as did the United States Supreme Court in *Piper Aircraft*.

A helpful discussion about application of the *forum non conveniens* in the context of cases like this one (foreign plaintiff, foreign injury, and domestic product manufacturer) appears in the article by Douglas W. Dunham and Eric F. Gladbach, entitled Forum Non Conveniens and Foreign Plaintiffs in the 1990s, 24 Brooklyn J. Int'l L. 665 (1999).[1] In discussing the public interest factors, the authors note that foreign jurisdictions have a strong interest in controlling the marketing and sale of products within their own borders. *Id.* at 686-687.

[1] The Dunham & Gladbach article is available on line on Westlaw and Lexis.

Without respect to the question where a particular product was originally *manufactured*, it would be presumptuous for a Michigan court to assume that it is in the best position, or has the greatest interest in, deciding the safety standards applicable to products *used* in some other country. It is reasonable to assume that the cost-benefit analysis employed by a different nation might yield "higher" or "lower" safety standards than those in place in Michigan. Those foreign standards should be respected. And if they are to be applied, they should be applied by the familiar home court. In sum, because analysis of the costs and benefits of a product would directly affect persons in the jurisdiction where the product is used, that jurisdiction has the greatest interest in adjudicating a dispute regarding the safety of the product.

Another factor highlighted in the Dunham & Gladbach article is the burden on American taxpayers caused by the American adjudication of foreign disputes. As the authors note, "it would be fundamentally unfair to permit foreign plaintiffs to use already backlogged American courts that are 'paid for by U.S. taxpayers and whose juries are composed of U.S. citizens who are asked to drop their everyday activities to' help adjudicate an action." Dunham & Gladbach, at p 689, quoting *Warn v M/Y Maridome*, 961 F. Supp. 1357, 1378 (S.D. Cal. 1997). The maintenance of courts is a community expense the purpose of which to resolve community disputes. Michigan courts do not exist, and are not supported by the tax dollars of Michigan citizens, to ensure that the appropriate compensation, if any, is paid to foreign plaintiffs for foreign injuries.

C. The Merits of a Categorical Rule

Defendant proposes the adoption of a categorical rule supporting the dismissal, on *forum non conveniens* grounds, of all cases brought by foreign plaintiffs arising from incidents occurring on foreign soil. From the context of Defendant's argument, it is clear that under Defendant's proposed categorical rule, the word "foreign" refers merely to plaintiffs and

incidents outside of the *United States*, rather than to all plaintiffs and incidents occurring outside of *Michigan*. Thus, Defendant's proposed categorical rule would apply to a Michigan case brought by a Croatian resident based on a Croatian incident, but would not apply to a Michigan case brought by an Illinois plaintiff based on an Illinois incident.[2] This distinction makes sense given the fact that cases involving truly foreign plaintiffs and incidents present special *forum non conveniens* circumstances not present in the Illinois example—such as the lack of full faith and credit and the lack of a common judicial heritage.

As a general legal principle, the use of categorical rules is desirable. In an excellent essay espousing the merit of categorical rules, United States Supreme Court Justice Antonin Scalia explains that the use of categorical rules, when appropriate, promotes the virtues of consistency, efficiency and predictability in the law. See Scalia, Essay, The Rule of Law as a Law of Rules, 56 U Chi L Rev 1175 (1989).[3] The use of categorical rules, as opposed to deciding each individual case, separately, based on the totality of the individual circumstances involved, promotes a more restrained, even-handed form of justice:

> I had always thought that the common-law approach had at least one thing to be said for it: it was the course of judicial restraint, "making" as little law as possible in order to decide the case at hand. I have come to doubt whether that is true. For when, in writing for the majority of the Court, I adopt a general rule, and say, "This is the basis of our decision," I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle. In the real world of appellate judging, it displays more judicial restraint to adopt such a course than to announce that, "on balance," we think the law was violated here—leaving ourselves free to say in the next case that, "on balance," it was not. It is commonplace that the one effective check upon arbitrary judges is criticism by the bar and the academy. But it is no more possible to demonstrate

[2] The *forum non conveniens* doctrine would, of course, apply to both cases. It is only in the situation involving a foreign plaintiff suing to recover for a foreign injury that a categorical rule makes sense.

[3] The Scalia essay is available on-line on Westlaw and Lexis.

> the inconsistency of two opinions based upon a "totality of the circumstances" test than it is to demonstrate the inconsistency of two jury verdicts. Only by announcing rules do we hedge ourselves in. [*Id.* at 1179-1180.]

Based on the United States Supreme Court's reasoning in *Piper Aircraft, supra*, one may safely generalize that tort cases brought by foreign plaintiffs involving foreign injuries may, as a rule, be dismissed on *forum non conveniens* grounds. If one can make this generalization, then one should do so, because, for the reasons identified in Justice Scalia's essay, the consistent application of a an easy-to-apply categorical rule is preferable to numerous ad hoc applications of a balancing test.

II. The "seriously inconvenient" test for application of the *forum non conveniens* doctrine should be rejected for the reasons set forth in *Piper Aircraft Co v Reyno*, 454 US 235 (1981).

The Second Restatement of Conflicts declares that "[a] state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff." This declaration appears in footnote 2 of this Court's *Cray* decision without comment. Nowhere in the text of the *Cray* decision did this Court undertake to determine whether Michigan was a "seriously inconvenient forum." Nor did the *Cray* Court endeavor to explain how a "*seriously* inconvenient forum" might differ from an "inconvenient forum" or a "less convenient forum." It is apparent from a review of the *Cray* opinion that the "seriously inconvenient" language played no concrete role in the Court's decision-making process. Nowhere in the *Cray* decision is it suggested that courts should make a threshold determination regarding the seriousness of the inconvenience posed by the plaintiff's chosen forum before moving on to consider which forum would be most convenient.

Nevertheless, a few Court of Appeals cases following *Cray* have elevated the "seriously inconvenient" phrase into a separate, stand alone test. In *Robey v Ford Motor Co*, 155 Mich App 643, 645; 400 NW2d 610 (1986), the Court of Appeals explained:

> When a party requests that a court decline jurisdiction based on the doctrine of forum non conveniens, there are two inquiries for the court to make: whether the forum is inconvenient and whether there is a more appropriate forum available. If there is not a more appropriate forum elsewhere, the inquiry ends and the court may not resist imposition of jurisdiction. If there is a more appropriate forum, the court still may not decline jurisdiction unless its own forum is seriously inconvenient.

See also *Miller v Allied Signal, Inc*, 235 Mich App 710, 713; 599 NW2d 110 (1999); *Manfredi v Johnson Controls, Inc*, 194 Mich App 519, 527; 487 NW2d 475(1992). The Court of Appeals decision in the instant case took the "seriously inconvenient" language even further, explaining that "[e]ven if another more appropriate forum exists, the court still may not resist jurisdiction unless its own forum is seriously inconvenient." (See Court of Appeals opinion, Appellant's Appendix, pp 11a-12a; internal quotation remarks removed). As the instant Court of Appeals decision makes expressly clear, use of the "seriously inconvenient" language shifts the focus away from simply determining the most convenient forum and instead places a premium on the forum selected by the Plaintiff. Under the Court of Appeals logic, merely showing the existence of a more convenient forum is not sufficient. The defendant must also establish that the plaintiff's chosen forum is "seriously," as opposed to "trivially" or "jokingly" inconvenient.

The "seriously inconvenient" standard is, at best, an imprecise test. No precedent exists to assist courts and litigants in determining which inconveniences rise to the level of "serious" inconveniences. Because nobody knows exactly what the standard means, even-handed application is problematic. Use of such an amorphous standard would undoubtedly tempt judicial improvisation.

Simply defining the "seriously inconvenient" standard in more concrete terms, however, will not solve all of the problems inherent in use of the "seriously inconvenient" language. *Amicus* advocates that placing a premium on the plaintiff's choice of forum is, in itself, unwarranted. This is especially so in cases, like the present case, in which the plaintiff has

chosen an atypical forum (meaning one other than the forum in which the plaintiff resides or suffered injury).

What reason other than forum shopping would prompt a plaintiff to select a forum away from both its home and the scene of the accident? Forum shopping, which does not serve the ends of justice, should not be rewarded. One might argue that a defendant who brings a *forum non conveniens* motion is also forum shopping. There is, however, an important difference. The plaintiff is permitted to make his or her initial forum choice without any strings attached (other than the basic jurisdictional requirements). On the other hand, a defendant seeking to change the forum must persuade a neutral judge, over the plaintiff's opposition, that some other forum is both appropriate and more convenient than the plaintiff's selected forum. This process ensures that the most convenient forum will be used, provided the court does not allow its deference to the plaintiff's forum choice to outweigh its determination of which forum would be most convenient.

In *Piper Aircraft*, *supra*, the United States Supreme Court addressed a case nearly identical to the case now before this Court. Scottish citizens, injured in a Scottish airplane crash, sued a Pennsylvania airplane manufacturer, in a Pennsylvania federal court, for injuries allegedly caused by a product defect. The district court granted a motion to dismiss on *forum non conveniens* grounds; the Third Circuit Court of Appeals reversed the district court; and the United States Supreme Court, by Justice Marshall, reversed the Court of Appeals, reinstating the district court's dismissal. See *id.* at 238.

The *Piper Aircraft* decision is noteworthy for a number of reasons. First, it is factually on point. Second, the *Piper Aircraft* decision, even more so than the Supreme Court's earlier *forum non conveniens* decisions, emphasized that *convenience* is the touchstone of the *forum non*

conveniens doctrine. See *Piper Aircraft*, *supra* at 248, 256 (explaining that "the central purpose of the *forum non conveniens* inquiry is to ensure that the trial is convenient"). Finally, and perhaps most importantly, the *Piper Aircraft* decision dispelled the notion that the forum choices made by foreign plaintiffs are entitled to significant deference. Citing *Koster v American Lumbermans Mutual Casualty Co*, 330 US 518, 524; 67 S Ct 828; 91 L Ed 1067 (1947), the Court explained that "a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum." *Piper Aircraft*, *supra* at 255. Residence is a proxy for convenience. *Id.* at 256, n 23, citing *Pain v United Technologies Corp*, 205 US App DC 229, 253; 637 F2d 775 (1980). Thus, it is reasonable to assume that a resident plaintiff would chose the home forum for reasons of convenience, but "[w]hen the plaintiff is foreign," reasoned the Court, "this assumption is much less reasonable." *Id.* at 256. Convenience to *all* interested persons—not the *plaintiff's* desire—is the paramount consideration.

When one considers that *both* parties must litigate a case and be bound by its result, the value of sacrificing convenience solely to give deference to a plaintiff's forum selection is dubious—especially when there is no natural reason for the plaintiff's forum selection (such as plaintiff's residence or the site of the injury). Because convenience to both parties is more important than the plaintiff's strategic forum calculation, deference to the foreign plaintiff's forum choice should not be afforded any weight in cases like the present. The *Robey* "seriously inconvenient" rule upsets this logic by creating an unjustified structural preference in favor of the plaintiff's selected forum. For the reasons stated in *Piper Aircraft*, the *Robey* rule should be rejected.

III. Appellate courts should not lose sight of the fact that a trial court's decision to invoke the *forum non conveniens* is a matter of discretion reviewable only for abuse.

In its current form, application of the *forum non conveniens* doctrine is subject to the sound discretion of the trial court. See, e.g., *Cray*, *supra* at 395-397; *Piper Aircraft*, *supra* at 257 (holding that "where the court has considered all relevant public and private interest factors, and where its balancing of those factors is reasonable, its decision deserves substantial deference"). This rule makes sense, as the trial court would typically be in the best position to determine how convenient it would or would not be to try a case in its own courtroom.

Judicial tests that require courts to consider and balance a list of factors tend to obscure the abuse of discretion standard of review. There is a risk that an appellate court will undertake its own independent consideration and application of the factors thereby allowing its independent judgment to take precedence over the trial court's earlier consideration of the same balancing test. That seems to be what happened here. Although the Court of Appeals paid lip service to the abuse of discretion standard, a review of the Court of Appeals actual decision-making process shows that the panel effectively applied a *de novo* review to the *Cray* factors. In short, the Court of Appeals disagreed with the trial court's analysis of the private and public interest factors and simply substituted its own judgment for that of the trial court. There is no evidence that the Court of Appeals panel actually afforded any real deference to the trial court's different conclusions on the same factors. To have an appellate court merely re-weigh and re-balance the same factors already weighed and balanced by the trial court, without the determination of any distinctly *legal* question, is a waste of appellate judicial resources. Cf. Scalia, Essay, The Rule of Law as a Law of Rules, 56 U Chi L Rev at 1182 (concluding that "at the point where an appellate judge says that the remaining issue must be decided on the basis of the totality of the

circumstances, or by balancing all the factors involved, he begins to resemble a finder of fact more than a determiner of law").

The abuse of discretion standard emphasizes the trial court's paramount role in resolving questions that are factual and case specific in nature. When properly applied it should impose a significant barrier to appellate reversal. As this Court explained in *Spalding v Spalding*, 355 Mich 382; 94 NW2d 810 (1959), the abuse of discretion standard mandates extraordinary deference to the trial court's decision:

> The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. [*Id.* at 384-385.]

While this language is undeniably strong, it cannot be ignored. The *Spalding* formulation remains the standard by which discretionary decisions must be judged. In *Michigan Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000), quoting *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 228; 600 NW2d 638 (1999), this Court indicated its continued approval for "the *Spalding* standard":

> An abuse of discretion involves far more than a difference in judicial opinion. *Williams v Hofley Mfg Co*, 430 Mich 603, 619; 424 NW2d 278 (1988). It has been said that such abuse occurs only when the result is "'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959), and noting that, although the *Spalding* standard has been often discussed and frequently paraphrased, it has remained essentially intact.

See also *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000).

Future panels of the Court of Appeals may likewise overlook the abuse of discretion standard when considering the private and public interest factors in *forum non conveniens* cases.

Accordingly, MMA advocates a strong warning from this Court regarding (1) the importance of the abuse of discretion standard in the *forum non conveniens* context, and (2) the stringency of the abuse of discretion standard of review would benefit the bench and bar.

IV. Application of the *forum non conveniens* is consistent with Michigan law.

Plaintiff makes a number of arguments against the *forum non conveniens* doctrine that can be easily dismissed. First, Plaintiff argues that Const 1963, art 3, § 7 bars courts from changing the common law as it existed in 1963 when the current State Constitution was ratified. This is a misreading of the State Constitution. The provision states only that the common law remains in force *until changed*. Because the common law may be changed judicially, the *Cray* Court was free to "change" the common law of *forum non conveniens*, if that is, in fact, what it did. In other words, the word "changed," as used in Const 1963, art 3, § 7, contemplates judicial as well as legislative change. See *Myers v Genesee County Auditor*, 375 Mich 1, 7; 133 NW2d 190 (1965). Otherwise, hundreds of this Court's decisions since 1963 would be invalid.

Plaintiff's argument that the *forum non conveniens* doctrine contravenes the constitutional and statutory grants of jurisdiction to Michigan courts is also wrong. The *forum non conveniens* has nothing to do with jurisdiction, because a decision to dismiss on *forum non conveniens* grounds is not based on a lack of jurisdiction, but presupposed the existence of jurisdiction. See *Cray*, *supra* at 395 ("The principle of *forum non conveniens* establishes the right of a court to resist imposition upon its jurisdiction although such jurisdiction could properly be invoked."); *Gilbert*, *supra* at 506-507 ("In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.").

Plaintiff's argument that the *forum non conveniens* doctrine is contrary to Michigan's venue statutes also is just plain wrong. Michigan's venue statutes determine which county, *within Michigan*, is a proper county in which to bring an action. The *forum non conveniens* doctrine has no application within Michigan on a county-by-county basis. Instead, the *forum non conveniens* doctrine applies only when the defendant seeks to have a case dismissed out of Michigan altogether because the Michigan court is not the most convenient forum in which to try the case. It is impossible to imagine a situation where application of the *forum non conveniens* doctrine would conflict, in any way, with Michigan's county-by-county venue statutes. To the extent that the venue statutes address the concept of convenience, they do so solely within the State of Michigan, on a county-by-county basis.

Plaintiff's argument that treating *forum non conveniens* as a jurisdictional rule would cause standard of review problems and issue preservation problems is based on Plaintiff's erroneous assumption that *forum non conveniens* is a jurisdictional rule. Because *forum non conveniens* is not a jurisdictional rule, none of Plaintiff's concerns merit serious consideration. Because *forum non conveniens* is not a matter of subject matter jurisdiction, it makes perfect sense that defendants may not raise *forum non conveniens* for the first time on appeal. The *Cray* decision correctly recognized that the timeliness of the request to dismiss is a factor to consider in determining whether to dismiss on *forum non conveniens* grounds. *Cray*, *supra* at 396. Also, because *forum non conveniens* is a discretionary matter for the trial court, and not a jurisdictional question of law, it is perfectly logical for *forum non conveniens* questions to be reviewed for abuses of discretion while jurisdictional questions are reviewed de novo. True jurisdictional questions merit different treatment because, unlike *forum non conveniens*, they go to the power

of the court to hear and resolve the dispute. The focus of the *forum non conveniens* doctrine, on the other hand, is convenience.

CONCLUSION

For the reasons stated, the MMA urges this Court to REVERSE the Court of Appeals decision and reinstate the decision of the Wayne County Circuit Court. In so doing, this Court should (1) clarify the public interest factors according to *Gilbert* and *Piper Aircraft* and consider adopting a categorical rule applicable to *forum non conveniens* issues involving foreign plaintiff's suing to recover for foreign injuries, (2) reject the *Robey* "seriously inconvenient" rule on the ground that the forum choices made by foreign plaintiffs are not entitled to any significant deference, and (3) to the extent that no categorical rule is adopted, reiterate the importance of the abuse of discretion standard in reviewing *forum non conveniens* decisions.

Respectfully submitted,

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